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Bradford Mank

University of Cincinnati College of Law, brad.mank@uc.edu

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STATE STANDING IN *UNITED STATES V. TEXAS*: OPENING THE FLOODGATES TO STATES CHALLENGING THE FEDERAL GOVERNMENT, OR PROPER FEDERALISM?

Bradford C. Mank*

In United States v. Texas, the Supreme Court, by an equally divided vote of four to four, affirmed the decision of the U.S. Fifth Circuit Court of Appeals that the State of Texas had Article III standing to challenge the Department of Homeland Security's ("DHS") directive establishing a Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program to grant lawful immigration status to millions of undocumented immigrants. A serious question is whether state standing in this case will open the floodgates to allow states to challenge virtually every federal executive action. On the other hand, state challenges are arguably appropriate in a federalist system to oppose expansive national government overreaching that depreciates the rights of states and their citizens.

In its 2007 decision Massachusetts v. EPA, the Court endorsed the principle that states deserve special solicitude for standing because of their quasi-sovereign or parens patriae interest in protecting their citizens, and because they abandoned their sovereign rights to join a federal nation-state. The petitioner federal government tried to distinguish the Texas litigation from the prior Massachusetts decision. In particular, the federal government argued that Texas grieved of a self-inflicted injury because it could have raised its fees on driver's licenses to avoid incurring costs from issuing licenses to immigrants covered by DAPA. A ma-

* James Helmer, Jr. Professor of Law and Associate Dean for Academic Affairs, University of Cincinnati College of Law, P.O. Box 210040, University of Cincinnati, Cincinnati, Ohio 45221-0040, Telephone 513-556-0094, Fax 513-556-1236, e-mail: brad.mank@uc.edu. I thank my faculty for their comments at a summer presentation and especially Michael Solimine for his comments. All errors or omissions are my responsibility. I joined an amicus brief favoring the standing of the State of Texas in Brief for Federal Courts Scholars and Southeastern Legal Foundation as Amici Curiae Supporting Respondents, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674), <http://www.scotusblog.com/wp-content/uploads/2016/04/15-674-bsac-Fed-Courts-Scholars.pdf>. I argued in favor of state standing in my articles, Bradford C. Mank, *No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit's Decision in Washington Environmental Council v. Bellon*, 63 AM. U. L. REV. 1525 (2014); Bradford C. Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?*, *Massachusetts v. EPA's New Standing Test for States*, 49 WILLIAM & MARY L. REV. 1701 (2008).

jority of the Fifth Circuit panel, however, relied upon the Massachusetts decision's "special solicitude" for state standing in concluding that Texas had an injury sufficient by standing from having to issue driver's licenses, although one judge dissented. Nevertheless, the Fifth Circuit in Texas suggested several legal doctrines that would limit the number of state suits and, thus, avoid allowing a flood of state suits against the U.S. government.

This Article considers several theories relating to state standing and then proposes a state-standing approach based upon both the Massachusetts and Texas decisions. In light of these two decisions, there is a federalism argument for allowing expansive state standing to address injuries to a state's quasi-sovereign and *parens patriae* interests. Additionally, there is a conservative or libertarian argument for broad state standing to limit excessive national or executive authority. This Article, however, agrees with the Fifth Circuit's approach in Texas—allowing state standing in suits where there is a substantial injury to a state's interest but using other legal doctrines to prevent a deluge of state suits on every conceivable issue.

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I. INTRODUCTION

In *United States v. Texas*, the Supreme Court, by an equally divided vote of four to four, affirmed the decision of the U.S. Fifth Circuit Court of Appeals that the State of Texas had Article III standing to challenge in federal court the Department of Homeland Security's ("DHS") directive establishing a Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program to grant lawful immigration status to millions of undocumented immigrants.¹ A serious question is whether state standing in this case will open the floodgates to allow states to challenge virtually every federal executive action.² On the other hand, state challenges are arguably appropriate in a federalist system to oppose overreach by an expansive national government that depreciates the rights of states and their citizens.³

In its 2007 decision in *Massachusetts v. EPA*, the Court endorsed the principle that states deserve special solicitude for standing because of their quasi-sovereign or *parens patriae* interest in protecting their citizens, and because they abandoned their sovereign rights to join a federal nation-state.⁴ The petitioner federal government tried to distinguish the *Texas* litigation from the prior *Massachusetts* decision.⁵ In particular, the federal government argued that Texas grieved of a self-inflicted injury because it could have raised its fees on driver's licenses to avoid incurring costs from issuing licenses to immigrants covered by DAPA.⁶ A majority of the Fifth Circuit panel, however, relied upon the *Massachusetts* decision's "special solicitude" for state standing in concluding that Texas had an injury sufficient for standing by having to issue driver's licenses, although one judge dissented.⁷ Nevertheless, the Fifth Circuit in *Texas* suggested several legal doctrines that would limit the number of state suits, and, thus, avoid allowing a flood of state suits against the U.S. government.⁸

This Article considers several theories relating to state standing and then proposes a state-standing approach based upon both the *Massachusetts* and

1. 136 S. Ct. 2271 (2016), *aff'g by an equally divided court*, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015).

2. Brief for Professor Walter Dellinger As Amicus Curiae In Support of Petitioners at 10–15, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No.15-674), <http://www.scotusblog.com/wp-content/uploads/2016/03/15-674-tsac-Dellinger.pdf> (arguing Texas's standing argument would open the floodgates to endless state challenges to federal actions); Amanda Frost, *Symposium: Second Thoughts on Standing*, SCOTUSBLOG (June 24, 2016, 7:28 AM), <http://www.scotusblog.com/2016/06/symposium-second-thoughts-on-standing/> (arguing the same); Todd Ruger, *Immigration Case Boils Down to State v. Feds*, CQ MAGAZINE, Apr. 2016, at 27–29 (arguing the same); see also *infra* Section IV.C.

3. Ernest Young, *Symposium: United States v. Texas and the Future of State-Federal Litigation*, SCOTUSBLOG (June 24, 2016, 9:27 AM), <http://www.scotusblog.com/2016/06/symposium-united-states-v-texas-and-the-future-of-state-federal-litigation/> (arguing in favor of state standing).

4. 549 U.S. 497, 518–20 (2007); Bradford C. Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?*, *Massachusetts v. EPA's New Standing Test for States*, 49 WILLIAM & MARY L. REV. 1701, 1727–29 (2008) [hereinafter Mank, *States Standing*] (discussing state standing under quasi-sovereign or *parens patriae* theories of standing); see *infra* Part III.

5. See *infra* Part IV.

6. See *id.*

7. See *infra* Section IV.B.

8. See *infra* Section IV.B.

Texas decisions.⁹ In light of these two decisions, there is a federalism argument for allowing expansive state standing to address injuries to a state's quasi-sovereign and *parens patriae* interests.¹⁰ Additionally, there is a conservative or libertarian argument for broad state standing to limit excessive national or executive authority.¹¹ This Article, however, agrees with the Fifth Circuit's approach in *Texas*—allowing state standing in suits where there is a substantial injury to a state's interest but using other legal doctrines to prevent a deluge of state suits on every conceivable issue.¹²

Part II explains the basics of Article III standing.¹³ Part III examines the state-standing decision in *Massachusetts* and Chief Justice Roberts's dissenting opinion in that case.¹⁴ Part IV discusses the *Texas* litigation and focuses on the Fifth Circuit's standing analysis.¹⁵ Part V considers various theories of state standing and argues in favor of state standing as a furtherance of federalism principles and state's rights against the federal government.¹⁶ Part VI, the conclusion, favors state standing in appropriate cases where the federal government causes a significant injury to a state's interests but also recognizes the need to invoke various limitations on suits to prevent suits over minor issues that do not substantially harm a state's interests.¹⁷

II. ARTICLE III CONSTITUTIONAL STANDING¹⁸

While the Constitution does not explicitly require that every plaintiff establish "standing" to file suit in a federal court, the Supreme Court has implied from Article III's limitation of judicial decisions to "cases" and "controversies" that federal courts must mandate standing requirements to ensure that a plaintiff has a genuine interest and a stake in the outcome of a case.¹⁹ For a

9. See *infra* Part V.

10. See *infra* Part II; *infra* Section IV.B; *infra* Section V.A.

11. See *infra* Section V.B; see generally RANDY BARNETT, OUR REPUBLICAN CONSTITUTION 168–202 (2016) (arguing for federalism, states' rights, and local control as the most practical antidote to concentrated power in our national government).

12. See *infra* Section IV.B.

13. See *infra* Part II.

14. See *infra* Part III.

15. See *infra* Part IV.

16. See *infra* Part V.

17. See *infra* Part VI.

18. Part II is based on my previous standing scholarship. See Bradford C. Mank, *No Article III Standing for Private Plaintiffs Challenging State Greenhouse Gas Regulations: The Ninth Circuit's Decision in Washington Environmental Council v. Bellon*, 63 AM. U. L. REV. 1525 (2014) [hereinafter Mank, *Standing for Private Plaintiffs*]; Mank, *States Standing*, *supra* note 4.

19. The constitutional standing requirements are derived from Article III, Section 2, which provides: The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State; between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl.1; see *Stark v. Wickard*, 321 U.S. 288, 310 (1944) (stating that Article III grants courts the power to "adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action or private persons or by the exertion of unauthorized administrative power"); see also *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340–41 (2006) (explaining why the Supreme Court infers

federal court to have jurisdiction over a case, at least one plaintiff must show he has standing to seek each form of relief sought.²⁰ Federal courts must dismiss a case if none of the plaintiffs meet the established Article III standing requirements.²¹

Standing requirements are based upon core constitutional principles. The standing doctrine incorporates the principle that federal courts should not hear or issue advisory opinions because such cases are not genuine cases or controversies.²² Also, standing requirements are consistent with separation of powers principles defining the division of powers between the judiciary and political branches of government so that the “Federal Judiciary respects ‘the proper—and properly limited—role of the courts in a democratic society.’”²³

Different members of the Supreme Court have disagreed, however, concerning when separation of powers principles limit Congress’s authority to authorize standing for private citizens to sue in federal courts challenging the executive branch’s under- or non-enforcement of congressional requirements that are arguably mandated by statute.²⁴ Justice Scalia, who died in February 2016 shortly before *United States v. Texas* was argued,²⁵ adopted a narrow approach to Article III standing because of his belief that courts and lawsuits should interfere with the policies of the executive branch only if a plaintiff had a personal, concrete injury.²⁶ Yet, some commentators believe that Texas would

that Article III’s case and controversy requirement necessitates standing limitations and clarifying that “[i]f a dispute is not a proper case or controversy, the courts have no business deciding it”). See generally Michael E. Solimine, *Congress, Separation of Powers and Standing*, 59 CASE W. RES. L. REV. 1023, 1036–38 (2009) (discussing a scholarly debate on whether the Framers intended the Constitution to require standing to sue).

20. See *DaimlerChrysler*, 547 U.S. at 355 (“[A] plaintiff must demonstrate standing separately for each form of relief sought.”) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)); Mank, *States Standing*, *supra* note 4, at 1710.

21. See *DaimlerChrysler*, 547 U.S. at 340–41 (emphasizing the importance of the case or controversy requirement); *Friends of the Earth*, 528 U.S. at 180 (adding that courts have an affirmative duty at the outset of the litigation to ensure that litigants satisfy all Article III standing requirements).

22. See *Chafin v. Chafin*, 568 U.S. 165, 171–72 (2013) (“Article III of the Constitution restricts the power of federal courts to ‘Cases’ and ‘Controversies.’ Accordingly, . . . [t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision. Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinion[s] advising what the law would be upon a hypothetical state of facts.”) (citations omitted) (internal quotation marks omitted).

23. *DaimlerChrysler*, 547 U.S. at 341 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984) (internal quotation marks omitted), *partially abrogated by* *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014)).

24. Compare *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”), and *id.* at 602 (Blackmun, J., dissenting) (arguing that the “principal effect” of the majority’s approach to standing was “to transfer power into the hands of the Executive at the expense—not of the Courts—but of Congress, from which that power originates and emanates”), with *id.* at 573–78 (concluding that Articles II and III of the Constitution limit Congress’s authority to authorize citizen suits by any person lacking a concrete injury and citing several recent Supreme Court decisions for support). See generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 496 (2008) (suggesting that “[u]nsurprisingly, sharp disagreement exists over what separation of powers requires” and arguing that courts should not use standing doctrine as “a backdoor way to limit Congress’s legislative power”).

25. Judy Melinek, *Justice Scalia’s Unexamined Death Points to a Problem*, CNN (Feb. 20, 2016, 9:38 PM), <http://www.cnn.com/2016/02/18/opinions/justice-scalia-no-autopsy-melinek/>.

26. *Lujan*, 504 U.S. at 573–78 (concluding that Articles II and III of the Constitution limit Congress’s authority to authorize citizen suits by any person lacking a concrete personal injury); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 885, 891,

have won the case five votes to four if Justice Scalia had lived to hear the case because of his concerns that the Obama Administration had overreached its executive authority in promulgating DAPA.²⁷

The Supreme Court has established a three-part test for constitutional Article III standing that requires a plaintiff to show that: (1) she has “suffered an injury-in-fact,” which is (a) “concrete and particularized” and (b) “actual or imminent, not conjectural or hypothetical”; (2) “there [is] a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able]²⁸ to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court”; and (3) “it [is] likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”²⁹ The plaintiff bears the burden of proving all three elements of constitutional Article III standing.³⁰

III. *MASSACHUSETTS V. EPA: PARENS PATRIAE* STATE STANDING³¹

The rights of state governments to obtain standing may be different from non-state or private parties in some circumstances. In *Massachusetts*, the Supreme Court held that a state government, the Commonwealth of Massachusetts, had Article III standing to sue the federal government for its failure to regulate greenhouse gas (“GHG”) emissions under the federal Clean Air Act (“CAA”) because states are “entitled to special solicitude in [the] standing analysis.”³² The *Massachusetts* decision did not squarely consider whether private parties have similar standing rights to bring climate-change suits against

894–97 (1983) (arguing separation of powers principles require litigants in federal courts to have personal, concrete injury to have standing).

27. Jonathan Adler, *Symposium: Tripped up by a Tie Vote*, SCOTUSBLOG (June 24, 2016, 7:41 AM), <http://www.scotusblog.com/2016/06/symposium-tripped-up-by-a-tie-vote/> (“The fact that the Court split four-four means, in all likelihood, the Obama administration would have lost the case had Justice Antonin Scalia not passed away earlier this year.”).

28. The *Lexmark* decision explained the distinction between the standing requirement of fairly traceable causation and the ultimate question of proving proximate causation on the merits as follows:

Proximate causation is not a requirement of Article III standing, which requires only that the plaintiff’s injury be fairly traceable to the defendant’s conduct. Like the zone-of-interests test . . . it is an element of the cause of action under the statute, and so is subject to the rule that “the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction.” . . . But like any other element of a cause of action, it must be adequately alleged at the pleading stage in order for the case to proceed If a plaintiff’s allegations, taken as true, are insufficient to establish proximate causation, then the complaint must be dismissed; if they are sufficient, then the plaintiff is entitled to an opportunity to prove them.

Lexmark Int’l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1391 n.6 (2014).

29. *Lujan*, 504 U.S. at 560–61 (second, third, and fourth alterations in original) (citations omitted) (internal quotation marks omitted).

30. *DaimlerChrysler*, 547 U.S. at 342 (“[P]arties . . . asserting federal jurisdiction [must] carry the burden of establishing their standing under Article III.”); *Lujan*, 504 U.S. at 561 (“The party invoking federal jurisdiction bears the burden of establishing these elements.”); Bradford C. Mank, *Prudential Standing Doctrine Abolished or Waiting for a Comeback?*: *Lexmark International, Inc. v. Static Control Components, Inc.*, 18 U. PA. J. CONST. L. 213, 257–58 (2015).

31. The discussion of *Massachusetts v. EPA* and state standing in Part III is based on my two earlier articles, Mank, *States Standing*, *supra* note 4, at 1727–29 and especially Mank, *Standing for Private Plaintiffs*, *supra* note 18, at 1536–45.

32. 549 U.S. 497, 518–20 (2007); Mank, *Standing for Private Plaintiffs*, *supra* note 18, at 1528, 1536–38.

the federal government or large, private GHG emitters, but the Court suggested that private parties might have lesser standing rights in observing that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan* [*v. Defenders of Wildlife*], a private individual.”³³ In the *Massachusetts* decision, the Court for the first time established that states have greater standing rights in some circumstances than non-state litigants pursuant to the *parens patriae* doctrine.³⁴ Chief Justice Roberts’s dissenting opinion, however, argued that states do not have greater standing rights than non-state litigants.³⁵

A. Justice Stevens’s Majority Opinion on State Standing

The *Massachusetts* decision invoked the *parens patriae* doctrine as a primary reason for recognizing greater standing rights for states than non-state plaintiffs.³⁶ The *parens patriae* doctrine originated as an English common law doctrine concerning the authority of the English King to protect incompetent persons, including minors, the mentally ill, and mentally limited persons.³⁷ Beginning in the early twentieth century, the Supreme Court recognized that states may sue in their capacity as *parens patriae* to protect quasi-sovereign interests in the health, welfare, and natural resources of state citizens.³⁸

Invoking the *parens patriae* doctrine, the *Massachusetts* decision stated that “the special position and interest of Massachusetts” was crucial in deciding the standing questions.³⁹ The Court observed that “[i]t is of considerable relevance that the party seeking review here is a sovereign State and not, as it was in *Lujan*, a private individual.”⁴⁰ Citing as precedent Justice Holmes’s 1907 *Georgia v. Tennessee Copper* opinion, which allowed Georgia to sue on behalf of its citizens to protect them from air pollution from another state because of the state’s quasi-sovereign interest in its natural resources and its citizens’ health, the *Massachusetts* decision concluded that the Court had long ago “recognized that States are not normal litigants for the purposes of invoking federal jurisdiction.”⁴¹ The *Massachusetts* decision reasoned that, “[j]ust as Georgia’s independent interest ‘in all the earth and air within its domain’ supported federal jurisdiction a century ago, so too does Massachusetts’ well-founded desire to preserve its sovereign territory today.”⁴² Furthermore, the *Massachusetts* court relied on the fact that Massachusetts “own[ed] a great deal of the ‘territory alleged to be affected’” to “reinforce[] the conclusion that its

33. 549 U.S. 497, 518–20; Mank, *Standing for Private Plaintiffs*, *supra* note 18, at 1528, 1536–39.

34. 549 U.S. at 518–20 (2007); Mank, *Standing for Private Plaintiffs*, *supra* note 18, at 1542–45.

35. 549 U.S. at 535, 548–49.

36. *Id.* at 518–20.

37. *Alfred L. Snapp & Son, Inc. v. P.R. ex rel. Barez*, 458 U.S. 592, 600 (1982); Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195, 195 (1978); Mank, *States Standing*, *supra* note 4, at 1756–57.

38. *Massachusetts*, 549 U.S. at 518–19; *Georgia v. Tenn. Copper*, 206 U.S. 230, 237 (1907); Mank, *States Standing*, *supra* note 4, at 1757–59.

39. *Massachusetts*, 549 U.S. at 518.

40. *Id.*

41. *Id.* at 518 (citing *Tenn. Copper*, 206 U.S. at 237).

42. *Id.* (quoting *Tenn. Copper*, 206 U.S. at 237).

stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power.”⁴³

Moreover, the *Massachusetts* decision concluded that states had standing to protect their quasi-sovereign interest in the health and welfare of their citizens because they had surrendered three essential sovereign authorities to the federal government: First, states may no longer use military force against other states or foreign governments; second, the Constitution forbids states from negotiating treaties with foreign governments; and third, federal laws may preempt state laws in some cases.⁴⁴ Because states had surrendered three important sovereign powers to the federal government, the Court reasoned that states could use their *parens patriae* authority as a partial substitute to retain a unique role for the states in a federal system of government by allowing states to sue in federal court to protect their quasi-sovereign interests in the health, welfare, and natural resources of their citizens.⁴⁵

Justice Stevens’s majority opinion in *Massachusetts* confusingly combined the *parens patriae* or quasi-sovereign rationale for state standing with other theories for recognizing standing, such as the argument that Congress conferred in the CAA a procedural right for states to challenge certain EPA decisions.⁴⁶ To validate state standing for the Commonwealth of Massachusetts, the Court invoked statutory language in the CAA to determine that Congress had required the EPA to use the federal government’s sovereign powers to protect states, among others, from vehicle emissions “which in [the Administrator’s] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”⁴⁷ Also, the *Massachusetts* decision observed that Congress has “recognized a concomitant procedural right to challenge the rejection of its rulemaking petition as arbitrary and capricious.”⁴⁸ Mixing these statutory justifications for standing with the *parens patriae* or quasi-sovereign rationale for state standing, the Court reasoned, “[g]iven that procedural right and Massachusetts’ stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis.”⁴⁹

A serious difficulty with the reasoning for state standing in the *Massachusetts* decision is that the Court did not clarify to what extent its acknowledgement of greater standing rights for states derived from *parens patriae* or quasi-sovereign principles or was based upon statutory or procedural rights in the CAA.⁵⁰ Because the *Massachusetts* decision relied on several different justifications for state standing, it is more complicated to decide how state-standing issues should be decided in cases with different facts, such as the im-

43. *Id.* at 519 (quoting *Tenn. Copper*, 206 U.S. at 237).

44. *Id.*

45. *Id.* at 519–20.

46. *Id.*

47. *Id.* (quoting 42 U.S.C. § 7521(a)(1) (2012)).

48. *Id.* at 520 (citing 42 U.S.C. § 7607(b)(1) (2012)).

49. *Id.*

50. Mank, *States Standing*, *supra* note 4, at 1733–34, 1746–47, 1755–56 (criticizing *Massachusetts* for not clarifying to what extent state standing in the case resulted from the *parens patriae* doctrine as opposed to other factors); Mank, *Standing for Private Plaintiffs*, *supra* note 18, at 1538–39 (criticizing the same).

migration challenges in the *Texas* litigation.⁵¹ Nevertheless, the Fifth Circuit in the *Texas* litigation properly relied upon the *Massachusetts* decision's recognition of special standing rights for states.⁵²

B. Chief Justice Roberts's Dissenting Opinion

In his dissenting opinion, Chief Justice Roberts emphasized that climate change is a global political problem that should be decided by the political branches, and therefore, it is a nonjusticiable general grievance unsuitable for resolution by the federal courts.⁵³ He also contended that neither the CAA nor the Constitution provided for the Court to apply a more generous standing test for states.⁵⁴ Moreover, he argued that states did not have greater standing rights under relevant *parens patriae* precedent.⁵⁵

1. *Parens Patriae Precedent Does Not Give States Expanded Standing Rights*

Chief Justice Roberts acknowledged that the Court in the *Tennessee Copper* decision granted states greater rights than private litigants, but he contended that the case provided states with more rights "solely with respect to available remedies" in authorizing Georgia to receive equitable relief when private litigants could obtain only a legal remedy.⁵⁶ He maintained that "[t]he case had nothing to do with Article III standing."⁵⁷ His standing argument is correct in a narrow sense, because the Court did not develop the modern standing doctrine until the 1940s,⁵⁸ but he did not address the suggestion in the majority opinion that broad standing rights for states would allow them to protect their quasi-sovereign interest in protecting the health of their citizens or their natural resources.⁵⁹

Adopting a restrictive interpretation of *parens patriae* precedent, Chief Justice Roberts reasoned that *parens patriae* litigation does not eliminate a plaintiff-state's mandate to establish an Article III standing injury because "[a] claim of *parens patriae* standing is distinct from an allegation of direct injury," and "[f]ar from being a substitute for Article III injury, *parens patriae* actions raise an additional hurdle for a state litigant: the articulation of a 'quasi-sovereign interest' 'apart from the interests of particular private parties.'"⁶⁰ Additionally, he claimed that the Court did not explain how its "special solicitude" for state standing could be justified "except as an implicit concession that petitioners cannot establish standing on traditional terms."⁶¹ There is some

51. See *infra* Part IV.

52. *Massachusetts*, 549 U.S. at 520; see *infra* Section IV.B.

53. *Massachusetts*, 549 U.S. at 535–36 (Roberts, C.J., dissenting).

54. *Id.* at 536–40.

55. *Id.* at 538–39.

56. *Id.* at 537–38.

57. *Id.* at 537.

58. See *supra* Section II.A.

59. See *supra* Section III.A.

60. *Massachusetts*, 549 U.S. at 538 (Roberts, C.J., dissenting) (citations omitted).

61. *Id.* at 540.

value to his criticism because Justice Stevens's majority opinion failed to articulate to what degree the Court invoked "special solicitude" for Massachusetts's status as a state to provide an easier standing test.⁶² Chief Justice Roberts maintained that "the status of Massachusetts as a State cannot compensate for petitioners' failure to demonstrate injury in fact, causation, and redressability."⁶³

2. *Climate Change is a Nonjusticiable General Grievance for the Political Branches*

Even conceding the plaintiffs' assumption that climate change is a significant public policy problem, Chief Justice Roberts, in his dissenting opinion, contended that it was a nonjusticiable general grievance or political question that should be decided by the political branches and not by the federal judiciary.⁶⁴ First, he asserted that the petitioners' injuries from global warming did not meet *Lujan*'s mandate that standing injuries be "particularized" because they were common to "the public at large."⁶⁵ Next, he reasoned that the Court's lenient approach to standing ignored separation-of-powers principles limiting the judiciary to "concrete cases."⁶⁶ Then, he contended that recognizing standing in a case involving the entire nation and the world at large embroiled the Court in policy issues, which are only within the scope of the political branches of government.⁶⁷ He implied that the ability of state citizens to elect representatives to Congress and a President was an adequate remedy to the loss of state sovereign rights when states entered the United States and, accordingly, that there was no reason for the Court to establish broad standing rights for states to raise questions of *parens patriae* or quasi-sovereign interests in the federal courts.⁶⁸

In sum, Chief Justice Roberts's dissenting opinion claimed that generalized harms, such as climate change, are issues to be decided by the political branches and not by federal courts, and, therefore, he rejected the majority's special solicitude for state standing in *parens patriae* or quasi-sovereign litigation.⁶⁹ Yet, during the oral argument before the Supreme Court in the *Texas* litigation, Chief Justice Roberts appeared to agree with Texas's argument that it had sufficient economic injuries from issuing drivers licenses to undocumented immigrants eligible for DAPA to establish Article III standing.⁷⁰ On

62. See Mank, *States Standing*, *supra* note 4, at 1733–34, 1746–47, 1755–56 (criticizing *Massachusetts* for not clarifying whether and to what extent the special treatment of state standing in the case resulted from the *parens patriae* doctrine as opposed to the special standing rights of plaintiffs seeking to vindicate procedural rights or other factors).

63. *Massachusetts*, 549 U.S. at 540 (Roberts, C.J., dissenting).

64. *Id.* at 535–36, 548–49.

65. *Id.* at 539–41, 543 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 573–74 (1992) (internal quotation marks omitted)).

66. *Id.* at 539–40, 547.

67. *Id.* at 535–36, 548–49.

68. See *id.* (arguing that the majority usurped the authority of political branches by unduly expanding standing rights of states).

69. Mank, *Standing for Private Plaintiffs*, *supra* note 18, at 1545.

70. *Immigration*, *supra* note 2, at 29 (reporting the standing questions during the *Texas* oral argument as suggesting that Chief Justice Roberts favored the view that Texas had economic injuries from issuing driver's

the other hand, Justice Breyer, who had joined the majority opinion in *Massachusetts*,⁷¹ appeared to agree with the Obama Administration that recognizing state standing based on the facts in the *Texas* litigation would interject the Court into inappropriate political disputes.⁷² Because of the equally divided tie vote, the Supreme Court in *United States v. Texas* did not reveal how the individual justices voted in the case, so we cannot be absolutely sure whether Chief Justice Roberts or Justice Breyer took an opposite position on state standing in the *Texas* case from how they each voted on standing in the *Massachusetts* decision.⁷³

IV. *TEXAS V. UNITED STATES* IN THE LOWER COURTS

A. *Summary of the Texas Litigation in the Lower Courts*

In 2012, the Secretary of DHS issued a memorandum establishing the Deferred Action for Childhood Arrivals (“DACA”) program, which authorized at least 1.2 million teenagers and young adults, who were born outside the United States but arrived in this country before the age of sixteen, to apply for deferred action status and employment authorizations if they meet certain conditions, such as not having a significant criminal record.⁷⁴ In 2014, DHS issued a second memorandum that expanded who qualifies for DACA and increased the length of employment authorizations from two years to three years.⁷⁵ Furthermore, the 2014 memorandum established a DAPA program for up to 4.3 million undocumented immigrants who have a son or daughter who is a U.S. citizen or lawful permanent resident to apply for deferred action status and employment authorizations, although DAPA applicants also must meet certain conditions, including continuously residing in the United States since before January 1, 2010 and not being an enforcement priority for criminal convictions.⁷⁶

Twenty-six states filed suit against the Secretary of DHS and other federal immigration officials to challenge DAPA under the Administrative Procedure Act⁷⁷ (“APA”) and the Take Care Clause⁷⁸ of the U.S. Constitution.⁷⁹ In

licenses that supported standing). See generally Transcript of Oral Argument at 5–6, 9, 13, 40, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No.15-674), http://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-674_b97d.pdf [hereinafter Oral Argument] (Chief Justice Roberts suggesting Texas would have an economic injury from issuing driver’s licenses to undocumented immigrants eligible for DAPA).

71. *Massachusetts*, 549 U.S. at 501 (listing Justice Breyer in the majority).

72. *Immigration*, *supra* note 2, at 29 (characterizing the standing questions during the *Texas* oral argument as suggesting Justice Breyer believed that broad state standing would invite undesirable political disputes before the Court). See generally Oral Argument, *supra* note 70, at 63 (Justice Breyer suggesting state standing in *Texas* case would open door to too many political disputes before the Court).

73. 136 S. Ct. at 2272 (“The judgment is affirmed by an equally divided Court.”).

74. *Texas v. United States*, 809 F.3d 134, 146–47 (5th Cir. 2015); *Texas v. United States*, 86 F. Supp. 3d 591, 608–09 (S.D. Tex. 2015). By the end of 2014, DHS had approved about 636 applications. *Texas*, 809 F.3d at 147; *Texas*, 86 F. Supp. 3d at 609.

75. *Texas*, 809 F.3d at 147; *Texas*, 86 F. Supp. 3d at 610–11.

76. *Texas*, 809 F.3d at 147–48; *Texas*, 86 F. Supp. 3d at 611.

77. 5 U.S.C. §§ 500–559 (2012).

78. U.S. CONST. art. II, § 3.

2015, the District Court for the Southern District of Texas, in an opinion by Judge Hanen, issued an injunction against the DAPA program on the grounds that the plaintiff-states were likely to succeed in their APA challenge.⁸⁰ The United States appealed the injunction to the Fifth Circuit, but the court of appeals, in a two-to-one decision, affirmed “the preliminary injunction because the states have standing; they have established a substantial likelihood of success on the merits of their procedural and substantive APA claims; and they have satisfied the other elements required for an injunction.”⁸¹ Judge King dissented from the majority opinion on all grounds, including standing and the procedural and substantive APA claims, and she therefore argued that the injunction was inappropriate.⁸²

B. The Fifth Circuit Concludes Texas Has Injury Sufficient for Standing from Issuing Driver Licenses to DAPA Beneficiaries

The Fifth Circuit emphasized the similarities between the *Texas* litigation and the standing discussion in *Massachusetts*.⁸³ The court of appeals reasoned that the state-plaintiffs in its case were entitled to the *Massachusetts* decision’s “special solicitude” for standing because the APA authorized states to challenge administrative actions like DAPA, the plaintiffs were within the “zone of interests” of the relevant immigration statutes, and DAPA affected the states’ quasi-sovereign interests in issuing drivers licenses.⁸⁴ Furthermore, the Fifth Circuit concluded that the plaintiff-states’ interests were comparable to those in *Massachusetts* because the federal government had taken from them the ability to control immigration, negotiate treaties with foreign nations on that subject, or exercise their police powers regarding immigration issues.⁸⁵

Additionally, the court of appeals cited the Supreme Court’s opinion in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,⁸⁶ where the Court held that Arizona’s legislature had standing to sue in response to a ballot initiative that removed its redistricting authority and vested it instead in an independent commission.⁸⁷ The Court concluded that the Arizona legislature was “an institutional plaintiff asserting an institutional injury” in regard to its constitutional power to regulate elections.⁸⁸ The Fifth Circuit con-

79. *Texas*, 809 F.3d at 146; *Texas*, 86 F. Supp. 3d at 607–08. In the Supreme Court, sixteen states and the District of Columbia filed a brief supporting the position of the U.S. Brief for the States of Washington, et al. as Amici Curiae Supporting Respondents, *United States v. State of Texas*, et al., 136 S. Ct. 2271 (2016) (No. 15-674), <http://www.scotusblog.com/wp-content/uploads/2016/03/March-8-AG-Amicus.pdf>.

80. *Texas*, 809 F.3d at 146; *Texas*, 86 F. Supp. 3d at 677.

81. *Texas*, 809 F.3d at 146.

82. *Id.* at 188–219 (King, J., dissenting).

83. *Id.* at 151–55, 159–62 (majority opinion).

84. *Id.* at 151–53.

85. *Id.* at 153–54.

86. *Id.* at 154 (citing *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015)).

87. *Arizona State Legislature*, 138 S. Ct. at 2665–66.

88. *Id.* at 2664.

cluded that the states in *Texas* were similar to Arizona's legislature in "asserting [an] institutional injury to their lawmaking authority."⁸⁹

The United States argued that there were three presumptions against the state having standing to challenge DAPA.⁹⁰ First, the federal government argued that there is a presumption that a plaintiff lacks standing to challenge decisions to confer benefits on, or not to prosecute, a third party.⁹¹ The Fifth Circuit, however, concluded that the cases cited by the government were inapplicable because DAPA involved more than just a decision not to prosecute—it also conferred benefits such as obtaining a lawful presence in the United States and certain benefits arising from that status, including obtaining a Texas subsidized driver's license.⁹² The United States argued a second presumption against justiciability in the immigration context, but the Fifth Circuit concluded that the cases the government cited did not involve standing.⁹³ Third, the United States invoked a presumption against federal courts deciding constitutional claims against the other two branches of government, but the court of appeals determined that it could decide the case on nonconstitutional grounds.⁹⁴

The Fifth Circuit held that Texas had proven a standing injury from the significant costs of issuing subsidized driver's licenses to DAPA beneficiaries.⁹⁵ The court of appeals rejected the United States' claim that Texas's losses in issuing subsidized driver's licenses to DAPA beneficiaries would be offset by other benefits to the state, such as increased employment and reduced welfare costs.⁹⁶ The Fifth Circuit reasoned, "[e]ven if the government is correct, that does not negate Texas's injury, because we consider only those offsetting benefits that are of the same type and arise from the same transaction as the costs."⁹⁷ The court of appeals determined that "none of the benefits the government identifies is sufficiently connected to the costs to qualify as an offset."⁹⁸

Next, the Fifth Circuit concluded that Texas had satisfied the traceable causation portion of the standing test because DAPA would clearly result in many beneficiaries applying for Texas driver's licenses.⁹⁹ The United States argued that Texas's injury was self-inflicted and was therefore not a cognizable standing injury or did not have causation proper for standing because the state could avoid injury by not issuing licenses to illegal aliens or by not subsidizing its licenses.¹⁰⁰ The Fifth Circuit, however, concluded that Texas had a standing injury and standing causation from the significant costs of issuing subsidized

89. *Texas*, 809 F.3d at 154.

90. *Id.*

91. *Id.*

92. *Id.* at 148–49, 154.

93. *Id.* at 154.

94. *Id.*

95. *Id.* at 155–60.

96. *Id.*

97. *Id.* at 155.

98. *Id.* at 156.

99. *Id.* at 156–60.

100. *Id.* at 156–57.

driver's licenses to DAPA beneficiaries.¹⁰¹ States do not have a duty to amend their laws whenever they may conflict with or may be preempted by federal law.¹⁰² Additionally, states do not have an obligation to raise fees or taxes whenever a conflict with federal policy might create economic losses to the states.¹⁰³

The United States also argued that Texas's injury was self-inflicted because the state voluntarily chose to base its driver's license policies on federal immigration law.¹⁰⁴ The government cited *Pennsylvania v. New Jersey*,¹⁰⁵ in which the Court held that several states lacked standing to contest other states' laws taxing a portion of nonresidents' incomes because the states' injuries were self-inflicted—specifically, Pennsylvania voluntarily granted its residents a tax credit for taxes paid to New Jersey and grieved of its tax losses.¹⁰⁶ By contrast to the voluntary tax losses Pennsylvania inflicted upon itself, the Fifth Circuit concluded that Texas could not avoid losses from granting driver's licenses because Texas has a duty to follow federal immigration classifications in determining who is eligible for driver's licenses, and, therefore, Texas must issue driver's licenses to DAPA beneficiaries if the memorandum creating the program is lawful.¹⁰⁷ Moreover, Texas had not manufactured standing because the Texas legislature had adopted subsidized licenses a year before the government announced the DACA program and three years before DHS promulgated DAPA.¹⁰⁸

The Fifth Circuit rejected the United States' contention that Texas had failed to prove traceable causation between the DAPA program and the likelihood of losses from the issuance of licenses to DAPA beneficiaries.¹⁰⁹ The court of appeals concluded that it was probable that many DAPA beneficiaries living in Texas would apply for driver's licenses and that there was less doubt about causation in this case than in the *Massachusetts* decision.¹¹⁰ The Fifth Circuit concluded that DAPA would be the primary cause for increased costs for the driver's license program in Texas and that the state had therefore proven traceable causation.¹¹¹ Next, the Fifth Circuit concluded that Texas had shown that its suit could prevent and redress any losses from driver's licenses by means of the preliminary injunction that temporarily suspended the DAPA program.¹¹²

As a final argument, the United States argued that Texas's standing argument was flawed because it would open the floodgates to states challenging asylum for a single alien or any federal policy that adversely affected a state's

101. *Id.* at 157–60.

102. *Id.* at 157.

103. *Id.* at 156–57.

104. *Id.* at 157.

105. 426 U.S. 660 (1976) (per curiam).

106. *Texas*, 809 F.3d at 157.

107. *Id.* at 158–59.

108. *Id.* at 159.

109. *Id.* at 159–60.

110. *Id.*

111. *Id.* at 160.

112. *Id.* at 160–61.

tax revenue.¹¹³ The Fifth Circuit reasoned that the Government's floodgate criticism was flawed because the *Massachusetts* decision "entailed similar risks, but the [Supreme] Court still held that Massachusetts had standing."¹¹⁴ The court of appeals observed that the *Massachusetts* decision could be broadly interpreted to challenge any federal action that could increase GHGs.¹¹⁵

The Fifth Circuit suggested several legal doctrines such as the "zone of interest" test, the rule against litigation of matters committed to agency discretion, or issues exempt from rulemaking or public comment requirements, which would limit the number of state suits and therefore prevent a flood of state suits against the United States.¹¹⁶ Additionally, the court of appeals reasoned that the *Massachusetts* decision's "special solicitude" test for state standing applied only where both a federal statute granted a procedural right to a state and where a quasi-sovereign interest was at stake, and, therefore, standing would not apply to remote issues as suggested by the United States in its briefs.¹¹⁷ Finally, the Fifth Circuit concluded that it was too speculative to consider the Government's slippery slope theory of possible state standing in cases involving a single individual.¹¹⁸ For example, a state challenge to a grant of asylum to a single alien would raise questions about whether there was a sufficient standing injury.¹¹⁹ Accordingly, the court of appeals held that Texas had standing to sue to challenge the DAPA program.¹²⁰

C. Judge King's Dissenting Opinion

In her dissenting opinion, Judge Carolyn King argued that the panel majority had wrongly relied upon "a single, isolated phrase" in the *Massachusetts* decision, "special solicitude," to conclude that Texas had standing to challenge DAPA.¹²¹ She claimed that "[i]t is altogether unclear whether the majority means that states are afforded a relaxed standing inquiry by virtue of their statehood or whether their statehood, in of itself, helps confer standing."¹²² She further reasoned, "*Massachusetts* also provides little instruction as to how far this 'special solicitude' reaches. The phrase appears only once in the *Massachusetts* majority opinion. And the Court has had no occasion to revisit it since."¹²³ This Author has previously criticized the *Massachusetts* decision for failing to clarify under what circumstances states have greater standing rights, so Judge King's observation that the case "provides little instruction as to how

113. *Id.* at 161–62.

114. *Id.* at 161.

115. *Id.*

116. *Id.* at 162.

117. *Id.*

118. *Id.*

119. *Id.* at 161–62.

120. *Id.* at 162.

121. *Id.* at 193 (King, J., dissenting).

122. *Id.*

123. *Id.* at 193–94.

far this ‘special solicitude’ reaches” has some validity.¹²⁴ Additionally, Judge King contended that the *Massachusetts* decision was distinguishable because the CAA in that case specifically provided for a procedural right for states to challenge decisions of the EPA, but that “[b]y contrast, neither the Immigration and Nationality Act¹²⁵ (“INA”) nor the APA specifically authorizes this suit.”¹²⁶

The panel majority, however, used a footnote to respond to her argument that the phrase “special solicitude” appeared only once in the *Massachusetts* decision and should therefore be effectively ignored as providing no real guidance on state standing.¹²⁷ In footnote twenty-six, the Fifth Circuit observed that the *Massachusetts* decision’s support of state standing rested upon more than the “special solicitude” phrase:

The dissent, however, avoids mention of the Court’s explanation that “[i]t is of considerable relevance that the party seeking review here is a sovereign State.” *Massachusetts v. EPA*, 549 U.S. at 518. In light of that enlargement on the “special solicitude” phrase, it is obvious that being a state greatly matters in the standing inquiry, and it makes no difference, in the words of the dissent, “whether the majority means that states are afforded a relaxed standing inquiry by virtue of their statehood or whether their statehood, in [and] of itself, helps confer standing.”¹²⁸

The panel majority was correct in pointing out that state standing was a central part of the *Massachusetts* decision and that “special solicitude” could not be treated as an isolated phrase in the decision as Judge King had argued it should.¹²⁹

Second, Judge King claimed that “the majority’s ruling raises serious separation of powers concerns.”¹³⁰ While it is true that Article III standing is closely related to separation of powers issues,¹³¹ the Court has divided about exactly when allowing standing would conflict with fundamental separation-of-powers principles.¹³² Judge King sought to provide substance for her separation-of-powers concerns by arguing that the “majority’s breathtaking expansion of state standing would inject the courts into far more federal-state disputes and review of the political branches than is now the case.”¹³³

Despite the majority’s assurances that various legal doctrines would limit the scope of state standing, Judge King’s third argument was that the majority’s approach would allow far too many state suits against the federal government and would transform the federal courts into administrative overseers of

124. Mank, *States Standing*, *supra* note 4, at 1733–34, 1746–47, 1755–56 (criticizing *Massachusetts* for not clarifying to what extent state standing in the case resulted from the *parens patriae* doctrine as opposed to other factors); Mank, *Standing for Private Plaintiffs*, *supra* note 18, at 1538–39 (criticizing the same).

125. 8 U.S.C. §§ 1101(a)–(h) (2012).

126. *Id.*

127. *Texas*, 809 F.3d at 151 n.26.

128. *Id.*

129. *See supra* Section III.A.

130. *Texas*, 809 F.3d at 194 (King, J., dissenting).

131. *See supra* Part II.

132. *See supra* note 19 and accompanying text.

133. *Texas*, 809 F.3d at 194 (King, J., dissenting).

the executive branch.¹³⁴ She criticized the majority's use of incidental costs related to driver's licenses to justify state standing for Texas to challenge DAPA.¹³⁵ Judge King complained that the Fifth Circuit's decision in the *Texas* litigation could serve as precedent to allow states to use indirect economic injuries "to allow limitless state intrusion into exclusively federal matters—effectively enabling the states, through the courts, to second-guess federal policy decisions—especially when, as here, those decisions involve prosecutorial discretion."¹³⁶ The panel majority, however, effectively argued that several legal doctrines could be invoked by courts to limit state suits against the federal government.¹³⁷ Part V examines how courts should strike a balance between allowing state standing for suits against federal actions that substantially impact a state while denying standing in cases involving indirect, marginal, or trivial injuries to a state.¹³⁸

V. STATE STANDING FURTHERS FEDERALISM AND STATES' RIGHTS

The Fifth Circuit majority in the *Texas* case was correct that courts will likely invoke standing principles, the zone of interests test, or other legal doctrines if states attempt to sue the federal government regarding relatively trivial issues such as the legal status of an individual alien or a single IRS revenue ruling.¹³⁹ Yet, even if the critics' claims of endless and unlimited state lawsuits against the United States are unfounded, Judge King's dissenting opinion makes a reasonable point that the Fifth Circuit's broad reading of state standing in *Texas* could open the door to far more state suits against the executive branch even if the floodgates are not completely open.¹⁴⁰ This Part argues that such suits could help preserve federalism and states' rights against a potentially overly expansive national government as long as courts reject suits over trivial injuries or issues that are not judicially reviewable because Congress has delegated them to the complete discretion of an agency, such as in individual enforcement decisions.¹⁴¹

134. *Id.* at 194–96.

135. *Id.* at 195–96.

136. *Id.*

137. *See supra* Section IV.B.

138. *See infra* Part V.

139. *Texas*, 809 F.3d at 161–62 (majority opinion).

140. *Id.* at 194–96 (King, J., dissenting).

141. *Id.* at 161–62 (majority opinion).

A. *Different Theories for State Standing*

1. *Professor Roesler's Governance Theory of State Standing*

There are various commentators who have argued for and against state standing, especially in the wake of the *Massachusetts* decision¹⁴² and even before the Court decided that case.¹⁴³ It would be impossible to address every different theory in favor of and against state standing rights in this Article, but I will discuss a few approaches in light of the *Texas* litigation. For example, Professor Shannon M. Roesler argues that “states should have ‘governance’ standing to challenge” the federal government’s actions when a federal statute gives the state a role in implementing the federal program.¹⁴⁴ Because neither DAPA nor federal immigration law, in general, contemplate an implementation role for states, Professor Roesler argues that standing was inappropriate in *United States v. Texas*.¹⁴⁵ Her standing analysis, however, ignores the significant impacts that the Fifth Circuit found DAPA had on Texas’s driver’s license program.¹⁴⁶ Her “governance” standing theory provides clarity as she claims, but that clarity comes at the expense of ignoring real standing injuries from federal actions that do not involve state implementation of a federal statute.¹⁴⁷

2. *The State Sovereignty Movement*

As part of a state “sovereignty movement,” several states have enacted statutes that sometimes prohibit state officers from assisting in the enforcement of federal laws and sometimes purport to nullify particular federal regulations.¹⁴⁸ In 2010, Congress passed, and President Obama signed into law, the Patient Protection and Affordable Care Act (“ACA”).¹⁴⁹ Virginia passed a state law proclaiming that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage.”¹⁵⁰ The Virginia statute sought to block the ACA’s “individual mandate,” which requires most individuals to either purchase health insurance or pay a penalty.¹⁵¹ Virginia sued the U.S. Secretary of the Department of Health and Human Services to block the individual mandate as an unconstitutional exercise of congressional power beyond the scope of the Constitution’s Commerce Clause.¹⁵²

142. Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851, 853 nn.7–10 (2016) (citing articles approving of and criticizing the *Massachusetts* decision).

143. *Id.* at 854 n.11 (citing articles).

144. Shannon M. Roesler, *State Standing to Challenge Federal Authority in the Modern Administrative State*, 91 WASH. L. REV. 637, 641–42, 677–702 (2016).

145. *Id.* at 699–02.

146. See *supra* Section IV.B.

147. Roesler, *supra* note 144, at 641–42, 677–702.

148. Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 614–58 (2015).

149. Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (2010); Raynor, *supra* note 148, at 614.

150. *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 267 (4th Cir. 2011) (quoting VA. CODE ANN. § 38.2-3434.1:1 (2011)); Roesler, *supra* note 144, at 695.

151. Roesler, *supra* note 144, at 695 (discussing 26 U.S.C. §§ 5000A(a)–(b) (2012)).

152. *Virginia*, 656 F.3d at 266; Roesler, *supra* note 144, at 695–96.

The U.S. Court of Appeals for the Fourth Circuit held that Virginia lacked standing because its statute merely declared that its citizens were exempt from federal legal requirements when those individuals could sue the government on their own behalf and because there was no evidence of injury to the Commonwealth based on that statute.¹⁵³ Virginia might have proven standing if it had instead focused on the impact of the ACA on state regulatory programs or on the fact that the ACA arguably requires states to participate in its implementation.¹⁵⁴ Furthermore, because Virginia passed its statute after the enactment of the ACA, the state statute may have appeared to be solely a declaratory attempt to nullify federal law.¹⁵⁵ By contrast, the Fifth Circuit specifically found that Texas had not manufactured standing because the Texas legislature had adopted subsidized licenses a year before the government announced the DACA program and three years before DHS promulgated DAPA.¹⁵⁶

3. *Professor Tara Leigh Grove's Arguments Limiting State Suits About Separation of Powers Concerns*

Professor Tara Leigh Grove argues that states should have standing to sue only to protect federalism principles when the federal government preempts or interferes with the enforcement of a state law.¹⁵⁷ But she contends that states should not have special solicitude standing to challenge how federal laws are enforced or alleged violations of the separation of powers based on that enforcement because state attorneys general have no special insight or interest in the operations of the federal government.¹⁵⁸ Professor Grove suggests the *Massachusetts* decision was wrong to recognize state standing based upon the EPA's failure to regulate greenhouse gases, but she also suggests that the Commonwealth of Massachusetts could have had standing if the Clean Air Act preempted a Massachusetts law that sought to regulate GHGs.¹⁵⁹

Professor Grove criticizes the Fifth Circuit's standing analysis in the *Texas* as DAPA litigation for granting standing based upon the costs of driver's licenses because that decision effectively allows Texas to challenge the implementation of federal law, the DAPA program.¹⁶⁰ Additionally, in general, and particularly in the *Texas* litigation, she contends that there should be a tight link between the injury asserted, the cost of driver's licenses, and the remedy so that Texas could not win a nationwide injunction against the enforcement of DAPA.¹⁶¹ Conversely, she would allow Texas to bring a declaratory action that it is not required to issue driver's licenses to DAPA beneficiaries because a

153. *Virginia*, 656 F.3d at 267–72; Roesler, *supra* note 144, at 696–97; *see also* Grove, *supra* note 142, at 876–80 (arguing that state laws that declare that their citizens are exempt from federal law are insufficient to provide state standing).

154. Roesler, *supra* note 144, at 697–98.

155. *Id.* at 696.

156. *Texas v. United States*, 809 F.3d 134, 159 (5th Cir. 2015).

157. Grove, *supra* note 142, at 854–57, 880–85.

158. *Id.* at 854–57, 886–99.

159. *Id.* at 889.

160. *Id.* at 894–95.

161. *Id.* at 895 n.215.

state should be able to challenge a federal law or action that forces the state to change its own law.¹⁶²

Professor Grove challenges the views of scholars who believe that state attorneys general are uniquely suited to bring actions against the federal government and instead argues that state attorneys general are mostly motivated by partisan political interests, although she acknowledges that they occasionally act in what they believe is the public interest.¹⁶³ Furthermore, she contends that states attorneys general are mostly experts in the interests of their own states and not in how federal laws should be implemented.¹⁶⁴ Moreover, Professor Grove wishes to limit state standing because “[s]tates already have broader authority to invoke the federal judicial power than other litigants.”¹⁶⁵

Professor Grove’s restrictive approach to state standing, however, would prevent states from establishing standing in federal courts to remedy real injuries, such as GHG emissions in the *Massachusetts* decision or the costs of driver’s licenses in the *Texas DAPA* litigation.¹⁶⁶ States should be able to challenge the implementation of federal law to prevent significant economic or physical injuries to a state or its residents.¹⁶⁷ That such suits sometimes protect the constitutional separation of powers from the executive branch’s arguably illegal actions is a potential bonus of state standing.¹⁶⁸ Conversely, as in the Virginia ACA litigation, a state would not have standing merely by enacting a state law declaring that its citizens are exempt from a federal law when a state suffers no proven injury.¹⁶⁹

B. Federalism Arguments for State Standing

The Tenth Amendment to the U.S. Constitution recognizes the importance and continuing role of states in our federal system of government.¹⁷⁰ In *Alfred L. Snapp & Sons, Inc. v. Puerto Rico, ex rel. Barez*, the Supreme Court recognized that “the State has an interest in securing observance of the terms under which it participates in the federal system.”¹⁷¹ In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court acknowledged that the Constitution does not explicitly explain the role or function of states in relationship

162. *Id.* at 895.

163. *Id.* at 895–98; see also Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 381–84 (2012) (discussing debate about whether amicus briefs from states attorneys general deserve deference because of their status as elected officials).

164. Grove, *supra* note 142, at 895–98.

165. *Id.* at 895 n.215.

166. See *supra* Section III.A; *supra* Section IV.B.

167. See *supra* Section III.A; *supra* Section IV.B.

168. See *supra* Section III.A; *supra* Section IV.B; *supra* Part V.

169. See *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 267 (4th Cir. 2011); *supra* Section V.A.2. It is possible Virginia might have shown injury from the federal Affordable Care Act to its regulatory programs, but it failed to do so in its litigation. Roesler, *supra* note 144, at 697–98.

170. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

171. 458 U.S. 592, 607–08 (1982); Brief for Federal Courts Scholars and Southeastern Legal Foundation as Amici Curiae Supporting Respondents, at 29, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674) [hereinafter *Amicus Brief*], <http://www.scotusblog.com/wp-content/uploads/2016/04/15-674-bsac-Fed-Courts-Scholars.pdf>.

to the federal government but reasoned in light of the Constitution as a whole that “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”¹⁷² In the modern era of broad executive authority and agency power, the primary protection for states is their representation in Congress.¹⁷³ Unilateral executive actions, such as DHS’s issuance of the DAPA memorandum, that avoid the legislative process raise questions about how states may protect their interests from executive actions that have significant impacts on states if Congress has no role in initiating or controlling a unilateral executive action.¹⁷⁴

The *Snapp* decision recognized that states may file a *parens patriae* action to protect the state’s quasi-sovereign interests in the health and welfare of its citizens.¹⁷⁵ Subsequently, the *Massachusetts* decision determined that states may file a *parens patriae* action to sue the federal government for violating a state’s interests under a federal statute.¹⁷⁶ The Fifth Circuit appropriately applied the *Massachusetts* decision’s special solicitude doctrine for state standing so that states could protect their interests against unilateral executive action when no other party had an effective opportunity to challenge that action.¹⁷⁷ Because state attorneys general are elected officials subject to the political process in each state, they are the best litigants for suits checking unilateral executive action that is not subject to effective congressional review.¹⁷⁸ Since the *Massachusetts* decision in 2007 opened the door to broader state standing rights in federal court, both Democratic and Republican state attorneys general have embraced the idea of serving as a check on federal executive action, especially when the sitting president is not from the same political party as the state attorney general filing suit in a particular case.¹⁷⁹

172. 469 U.S. 528, 550 (1985).

173. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (“[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress’ Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise.”); Amicus Brief, *supra* note 171, at 29–30.

174. Amicus Brief, *supra* note 171, at 25–26, 29–31.

175. *Snapp*, 458 U.S. at 608–09.

176. See *supra* Section III.A.

177. Amicus Brief, *supra* note 171, at 25–26, 29–31.

178. *Id.* at 25–31; Mank, *States Standing*, *supra* note 4, at 1783–85 (discussing the advantages of litigation by state attorneys general, although acknowledging states attorneys general may have biases based on desire for re-election or seeking higher office). But cf. PAUL NOLETTE, *FEDERALISM ON TRIAL* 13–17 (2015) (discussing how politics and private interests affect litigation by state attorneys general); Solimine, *supra* note 163, at 383–85 (questioning whether states attorneys general truly represent interests of their states).

179. Henry Gass, *Attorneys General Embrace Role as Check on Executive Power, On Right and Left*, CHRISTIAN SCI. MONITOR, (Dec. 21, 2016), <http://www.csmonitor.com/USA/Justice/2016/1221/Attorneys-general-embrace-role-as-check-on-executive-power-on-right-and-left>.

C. *State Standing Rights Protect Against Excessive National Government*

A more theoretical justification for broad state standing rights is based upon a libertarian goal of limiting the scope of government.¹⁸⁰ The Constitution's system of separation of powers and checks and balances attempts to limit the authority of any one power in government.¹⁸¹ DHS's unilateral issuance of a DAPA memorandum, however, is a prominent example of the executive branch using arguably unconstitutional methods to avoid legislative checks on executive power.¹⁸² State standing is the only practical means to challenge unilateral executive actions such as the DAPA memorandum.¹⁸³

Some libertarians argue for the complete elimination of all government.¹⁸⁴ Most libertarians, however, acknowledge that some amount of government is necessary, although they are strongly concerned with placing enforceable limits on the scope of government and its exercise of power.¹⁸⁵ In his 2016 book *Our Republican Constitution*, Professor Randy Barnett argues that it is more feasible to limit the power of state or local governments than the federal government because it is easier for citizens to move from one state or city to another but more difficult to move to a different country.¹⁸⁶ While he acknowledges that state and local policies are imperfect, he argues that a "rich diversity of preferred lifestyles can only be achieved at the local level" and that "it is preferable to have the variety of options provided by fifty state governments than a one-size-fits-all national policy."¹⁸⁷

Professor Barnett suggests that state governments should have some way to check the power of the federal government.¹⁸⁸ He does not discuss state standing in his book, but suits like the *Texas* litigation would offer the means to place some possible judicial checks on unilateral executive actions that bypass Congress.¹⁸⁹ Thus, state standing suits are consistent with his libertarian approach of favoring state and local governments against national power.

180. David Boaz, *Libertarianism*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/libertarianism-politics> (last visited Nov. 13, 2017) ("Although most libertarians believe that some form of government is essential for protecting liberty, they also maintain that government is an inherently dangerous institution whose power must be strictly circumscribed. Thus, libertarians advocate limiting and dividing government power through a written constitution and a system of checks and balances.").

181. See *id.*; *supra* Part II (discussing separation of powers principles); *supra* Section IV.B (discussing the same).

182. See *supra* Section V.B.; Amicus Brief, *supra* note 171, at 25–31, 36–37 (arguing state standing is the only practical way to challenge unilateral executive action and that states are within the zone of interest of the U.S. Constitution's Article II "Take Care" Clause).

183. Amicus Brief, *supra* note 171, at 25–31 (arguing state standing is only practical way to challenge unilateral executive action). Theoretically, Congress might impeach government officials or cut off appropriations to an agency, but impeachment requires a two-thirds majority in the Senate, and Congress would need a two-thirds majority to override a presidential veto of an appropriations bill. See Bradford C. Mank, *Does United States v. Windsor (The DOMA Case) Open the Door to Congressional Standing Rights?*, 76 U. PITT. L. REV. 1, 51–52 (2014) (discussing impracticability of impeachment and appropriation processes).

184. Boaz, *supra* note 180.

185. *Id.*

186. BARNETT, *supra* note 11, at 176–80.

187. *Id.* at 178.

188. *Id.* at 180.

189. Amicus Brief, *supra* note 171, at 25–31 (arguing state standing is the only practical way to challenge unilateral executive action).

VI. CONCLUSION

State standing and suits against executive actions are an imperfect limit on national political power because their success ultimately depends on whether the judges hearing the case appreciate the value of limiting federal power and restricting unilateral executive actions and whether the judges embrace libertarian values or adopt some combination of these principles. Professor Barnett's reform proposals emphasize structural limits on political power, such as constitutional conventions, because he considers judicial limits on national power ineffective and dependent on the personality of individual justices.¹⁹⁰ Nevertheless, the *Texas* litigation demonstrates that state standing allows states to at least challenge and question unilateral executive actions, and such suits are better than a system where no one can challenge an important legal question such as the validity of DAPA under the APA or Take Care Clause.¹⁹¹ Even if someone favors DAPA's policies, he or she should be concerned with the unilateral process adopted by the Obama administration.¹⁹² The *Massachusetts* decision's special solicitude for state standing and the Fifth Circuit's decision supporting state standing in *Texas v. United States* are the most practical solution to allow states to challenge arguably illegal actions by the executive branch or federal government.¹⁹³

Yet, the Fifth Circuit in *Texas* appropriately sought to balance allowing state standing in cases where states suffer significant injuries with imposing limitations on excessive suits through several non-standing legal doctrines that would limit the number of state suits and, accordingly, prevent state suits against the United States from becoming unmanageable for the federal courts.¹⁹⁴ In response to Judge King's concerns about opening a floodgate of litigation, the panel majority suggested that it would not allow state standing in cases where only minor injuries had occurred, such as an injury concerning a single individual that would have no appreciable impact on a state.¹⁹⁵ This Article agrees with the Fifth Circuit majority in *Texas* that it is possible to recognize state standing in cases where a state suffers a significant injury without permitting every conceivable state suit against the federal government.¹⁹⁶

190. BARNETT, *supra* note 11, at 170–71, 254–58 (explaining the concept of structural limits in the U.S. Constitution and proposing a constitutional convention to impose structural protections to secure individual liberties as a better alternative than relying on “judges who ignore the original meaning of our Republican Constitution.”).

191. See *supra* Section IV.B; *supra* Part V; Amicus Brief, *supra* note 171, at 25–31 (arguing state standing is only practical way to challenge unilateral executive action).

192. Amicus Brief, *supra* note 171, at 25–26, 29–31.

193. See *supra* Section IV.B; *supra* Part V; Amicus Brief, *supra* note 171, at 25–31 (arguing state standing is only practical way to challenge unilateral executive action).

194. See *supra* Section IV.B.

195. See *supra* Section IV.B; *supra* Section IV.C.

196. See *supra* Section IV.B.

